United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. T-4567

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH RACKER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1.) Whether the government sustained its burden as to the essential issue of the crimes charged;

2.) Whether the court below erred by denying appellant a trial by jury;

3.) Whether the court below erred by quashing appellant's subpoena duces tecum.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered on March 21, 1975 in the United States District Court for

the Eastern District of New York after a plea of guilty and a trial conducted before the Hon. Jack B. Weinstein, District Judge. The appellant stands convicted under Indictment 54 Cr. 589 of one count of Title 18 U.S.C. 371, 372 (conspiracy) and five counts of Title 41, Sec. 51 and 54 (prohibited payments by sub-contractors under "negotiated" contracts).

STATEMENT OF FACTS

The instant case arises out of the forty-three count Indictment alleging the payment of and the conspiracy to pay gratuities or kickbacks by appellant to various employees of the Grumman Aerospace Corporation in violation of Title 18, United States Code, Sections 371 and 2 and Title 41, United States Code, Sections 51 and 54. Appellant was an employee of a sub-contractor under numerous contracts between the United States Government and the Grumman Aerospace Corporation (1).

The substantive statute at the root of the Indictment, Section 51 of Title 41 prohibits payments by a sub-contractor, as an inducement or acknowledgement for the award of such a sub-contract or order, to any employee or agent of a prime contractor holding a negotiated contract entered into by any department, agency or establishment of the United States. Section 52 of Title 41 defines "negotiated contract" as one "made without formal advertising". (42)

On January 21, 1975 appellant pled guilty to one conspiracy count and five substantive counts of the Indictment (counts 1,4,10,16,19 and 36 respectively) in full satisfaction of the Indictment. By agreement with the Government and with the consent of the Hon. Jack B. Weinstein, United States District Judge, appellant reserved the right "to raise at a hearing before the District Court and on appeal the issue as to whether the prerequisite prime contracts between Grumman Aerospace Corp. and the Department of the Navy were 'negotiated' within the meaning of Title 41, United States Code, Sections 51-54" (26,51).

On March 12, 1975 the Government moved to quash appellant's subpoenas served upon the General Counsel of the United States Navy, the Secretaries of the Navy and Defense in Washington, D.C. and Grumman Aerospace Corporation (Grumman). These subpoenas sought the production of the original advertising, invitations to bid, specifications and best and final offers preceding the award of the initial contracts which appellant contended had been "formally advertised". Upon the argument of the Government that the production of items subpoenaed could be burdensome in light of the bulk and location of these records, the court quashed appellant's subpoenas. Judge Weinstein agreed with the Government's position that the items subpoenaed were irrelevant to the issue at bar, but granted appellant leave to review after the hearing. The

court did direct the Government to produce for the hearing copies of both the Design and Production Contracts in question and further ordered the Grumman Aerospace Corporation to also produce for the hearing its entire file. (64-74)

On March 14, 1975 a hearing was held before the Hon. Jack B. Weinstein wherein the Government had the burden of establishing whether the contracts cited in the Indictment were "negotiated". The court denied appellant's request for an impanelled jury indicating that such right had been waived by appellant's plea of guilty. Judge Weinstein further indicated that he viewed the hearing as one pursuant to Rule 33 as a motion to set aside the judgment of conviction based upon newly discovered evidence. (77-83)

Subpoenas duces tecum were served by appellant upon seven aircraft corporations and made returnable on the day of the hearing. The subpoenas requested the production of all pre-contract books and records with reference to the design, production and development of the aircraft cited in the Indictment. At the request of appellant's attorney testimony of representatives from these subpoenaed corporations was taken out of turn. The representatives of McDonnell Douglas Corp., Fairchild Republic and Martin Marietta Corp. testified that no such subpoenaed documents could be located in their respective corporate files. Telegrams from Textron,

Incorporated, transferee of Bell Aerospace Corporation and Lockheed Aircraft Corporation also indicated a search of their records proved fruitless. A telephone call to appellant's attorney from a representative of Boeing indicated that the corporation's records did not include the subpoenaed documents. North American Rockwell Corporation was the only company not responding to appellant's subpoena. A telegram to the same effect as the other responses was subsequently received and deemed into evidence. (85-102,114)

Ellsworth Baker, a deputy responsible for contracts employed by the Grumman Corporation (parent corporation of Grumman Aerospace and Grumman Aircraft Engineering Corporations), testified as the government's only witness. Mr. Baker identified exhibits 1-10 as extracts from ten "prime" contracts for the procurement and modification of aircraft, including support equipment and technical manuals. He testified that these contracts were between the United States Navy through the Naval Air Systems Command and Grumman. Objections to Baker's categorizations of the contracts as "prime" contracts based upon his lack of expertise were overruled by the court. The witness further identified exhibts 3B and 10B as full contracts (relating to Exhibits 3 and 10 respectively) having substantially the same provisions as the complete contracts of exhibits 1 through 9 in evidence. These last two exhibits were marked into evidence without objection. (103-123)

Mr. Baker viewed Exhibits 1 through 10 and indicated that on their face four of the contracts (Exhibits 1,2,3 and 6) were fixed price incentive contracts and that five (Exhibits 4,5,7,8 and 9) firmed fixed price contracts. Exhibit 10 was a basic order contract without any monetary figure. All the contracts had fixed prices that could be broken down to specific unit prices per aircraft. The incentive contracts differed from the firm fixed price contracts in that they provided for a sharing between the contracting parties for the costs and/or savings of over-runs and under-runs of the contracts. The witness referred to Exhibits 1 through 10 as "negotiated" contracts as he understood the term as opposed to "formally advertised" contracts. Mr. Baker's testimony as to this point was taken over appellant's objection to the witness' expertise. Mr. Baker further indicated "formal advertising" was very seldom used at Grumman and that he had very little experience with what Grumman considered "formal advertising". In twenty years of employment at Grumman Mr. Baker could only recall one or two solicitations from the government for "formally advertised" contracts and to his knowledge the corporation never entered into a "formally advertised" contract with the government for the production of aircraft. (123-131,134-156)

Upon cross examination Mr. Baker indicated that he either could not recall or definitely had no conversations

or "negotiations" with the Navy with respect to the contracts in evidence with the possible exception of Exhibit 1.[1] The witness explained the equitable adjustment section of one of the incentive contracts indicating that fixed prices (not included in the contract price) appeared under this section but the cost was not determinable. Mr. Baker then made reference to an appropriation data sheet but was unable to tell if the contract it came from was an incentive or a firm fixed price contract. (134-150, 157-164)

Under further cross examination Mr. Baker testified that no payments either to or from the government under any of the incentive contracts had been made. No repricing under these contracts had taken place but if and when such was done the incentive contracts would be converted into firm contracts. Mr. Baker concluded his testimony indicating that all the contracts in question (Exhibits 1 through 10) were "negotiated" only with Grumman and without competition. (164-171)

Following Mr. Baker's testimony the government decided not to introduce into evidence the Navy's determinations and findings which correspond to Exhibits 1 through 10 and rested their case upon the prior proceedings. Appellant re-

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[1] Mr. Baker recalled some talks during 1970 concerning that contract, but his prior testimony indicated he was in the latter part of an eighth month leave from Grumman when the contract was entered into in September of 1971.

newed his application with respect to the subpoenas quashed by the court. Judge Weinstein indicated he intended his ruling to affect only documents and not individuals. Following an offer of proof by appellant the court directed the government to bring in Mr. Erling Nelson, counsel to the Navy and a continuance was granted for this purpose. (172-177)

Judge Weinstein inquired of Mr. Baker if he had brought in the Design Contracts requested by appellant. These contracts were marked as Exhibits 11, 12 and 13. With respect to these exhibits Mr. Baker indicated he had no specific knowledge of the awarding of the contracts. He was generally familiar with the procedure. The contracts in question were for prototypes of aircraft. General industry solicitations are made followed by a contract given to the best design. This award then leads to a sole source procurement contract from, in the case of major systems, the winner of the design contract. The design contract is procured by "negotiations" using Grumman's interpretation of the Armed Servics Procurement Regulations.. (177-182).

The government's request to question Mr. Baker further with respect to the relevancy of Mr. Nelson's appearance was granted. Mr. Baker testified that exhibits 11, 12 and 13 were Design Contracts which related to the basic aircraft in question. Over appellant's objections, Mr. Baker further

testified that Exhibits 1 through 10 were separate, individual contracts and not modifications or amendments of the Design Contracts. (182-186)

The court continued its order quashing appellant's subpoeneas involving documents, but directed Mr. Nelson to appear with whatever information might be hepful and convenient. The hearing was continued until March 21, 1975. (188-190)

Erling Nelson, Deputy Counsel for the Naval Air Systems Command, testified for the defense. He had been a civilian attorney employed by Navy since 1956 and was considered the number two man in the country with respect to Naval Aircraft Procurement. Mr. Nelson testified that he was familiar with Chapter 135 (misstated or mistyped in the record as 125) of Title 10 U.S.C. (Encouragement of Aviation), but indicated that such was not the operable law under which the Navy proceeded. He testified that since the Armed Services Procurement Act of 1948 and pursuant to certain correspondence, the law, (Title 10, Chapter 135 U.S.C.) though still in full force and effect, could be bypassed. (195,199-201)[2]

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[2] The correspondence referred to by the witness between the Air Force General Counsel, Rep. Mendal Rivers and the Comptroller General was not produced. The witness' testimony was to the effect such letters were in a restricted file and were not made public or to be found in either the Navy or Executive Branch files. A motion by appellant to strike this testimony based on the hearsay rule was denied by the court.

Mr. Nelson was asked to describe the process by which the contracts for aircraft in question were originally awarded. He indicated that the original prime contract, the design contract, was "competitively negotiated" and not "formally advertised" or "negotiated". Mr. Nelson testified there was a difference between the three methods, but never specified what it was. He described the design process as follows:

1. A determination of the needs of the Navy is reached with ranges of performance and types of aircraft;

2. The information is made available to the industry by advertising in Commerce Business Daily or is mailed to representatives of the industry. (Mr. Nelson could not recall if publication was used for the craft in question, but indicated there was a substantial industry response);

3. Competitive bids are submitted which include actual design specifications, design costs and projected production costs. From the proposals technical men, as opposed to lawyers, choose the best overall design and cost proposals;

4. Simultaneously with the award of the design contract, there is a determination that if the designed craft meets specification and there is a need to produce, the production contract will be awarded to the company holding the original contract (in the instant case Grumman);

5. The production contract is the sole source contract going to the design contractor (Grumman) with whom

the government re-negotiates price terms and sometimes specifications. The production contract is a "prime" contract, but stems from the number one "prime" contract, the design contract.

Nelson further testified that since 1965 the government had never entered into a "formally advertised" contract with Grumman. (201-233)

Prior to the calling of the next witness the court asked for an offer of proof. As the question concerned the credibility of the last witness, the court directed that the proper foundation first be made. Upon questioning the witness testified that he had previously informed appellant's attorney that the Navy had been criticized by the General Accounting Office with respect to the time of the making of determinations and findings. The Navy would begin negotiations before the making of the determinations and findings, but would not enter into a contract until their determinations and findings were made. The General Accounting Office ruled that negotiations could not begin until after the determinations and findings were made. (224-226)

The defense rested its case, but asked the court to take judicial notice of certain regulations (Exhibit G). The court took judicial notice of these regulations, as well as those cited in the government's brief. Exhibits 11, 12 and

13 (design contract) were entered into evidence. The court also deemed into evidence a telegram from the North American Rockwell Corp. which indicated that the corporation could not locate subpoenaed documents. (226-228)

The appellant moved to dismiss the Indictment upon the grounds that the people failed to prove beyond a reasonable doubt that the initial contracts were not "formally advertised". The court ruled that the people had met their burden and denied appellant's motion to set aside his plea and for a new trial. Following the court's decision the appellant was sentenced to a:

> $10,000 fine on each count, a total of $60,000 consecutive. Two years on each count, suspended execution of sentence except for six months which is to be served in Community Treatment Center. The other year and a half to be on unsupervised probation. The total sentence, therefore, is two years, six months in Community Treatment Center and $60,000 fine.

Appellant's application for a stay pending appeal was granted. The remaining counts of the Indictment were dismissed upon the government's application. (228-241)

POINT I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONTRACTS WERE "NEGOTIATED"

41 U.S.C. 51 prohibits the payment of "any fee, commission or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly" by a sub-contractor to any agent, employee or officer, either of a prime contractor who holds a negotiated contract with the federal government or of a higher tier sub-contractor under such contract, when such payment is made "as an inducement for the award of a subcontract or order from the prime contractor or any sub-contractor, or as an acknowledgement of a subcontract or order previously awarded". 41 U.S.C. 51; United States v Perry, 431 F. 2d 1020 (10th Cir. 1970). (42)

41 U.S.C. 52 defines "negotiated contract" as any contract which is not procured by "formal advertisement". This civil statute which details a civil remedy for the government also has a penal application by the criminal sanctions provided for in Section 54. United States v Travers, 361 F. 2d 753 (1st Cir. 1966).

The United States Court of Appeals for the First Circuit set forth in Howard v United States, 35 F. 2d 126 (1st Cir.1965), the elements of the offense under 41 U.S.C. 51 et. seq.:

> In sum we think the essential elements of the crime defined by §54 are that the parties be within the class covered by the statute ... a contract covered by the statute ... and an acceptance of a prohibited payment as defined in §51 with knowledge of its nature and purpose.

The events at issue in Howard took place prior to 1960, at which time the statute applied to contracts made on a "costs-plus-a-fixed-fee or cost-reimbursable" basis. 41 U.S.C. 51. The fact that the 1960 amendment to the statute has substituted "negotiated" for "cost-plus-a-fixed-fee or cost-reimbursable" in no way alters the rationale of the Howard decision.

According to Howard, then an offense under 41 U.S.C. 51-54 cannot be committed unless a kickback is made which is in connection with "a contract covered by the statute". Because the Act applies only to contracts which are "negotiated" it follows that any contract which is "formally advertised" (i.e. non-"negotiated") is not covered by the statute.

The court in United States v Dobar, 223 F. Supp. 8 (M.D. Fla.1963) reached the same conclusion as in the Howard case. The court dismissed the indictments as fatally defective, holding that the failure to allege that payments were made in connection with a type of contract within the statute omitted an "indispensable element" of the crime under 41 U.SC. 51.

Therefore, Dobar and Howard, supra, squarely stand for the proposition that there is no offense under 41 U.S.C. 51 unless a kickback is made in connection with that type of contract within the purview of the Act. At present, the Act applies to "negotiated" contracts. Clearly, if a contract is "formally advertised" then it is not a crime under 41 U.S.C. 51 to make or receive a payment in connection therewith.

The appellant herein contends that the criminal application of 41 U.S.C. 51-54 is unconstitutional based upon the vagueness of the definitions of "formally advertised" and "negotiated"; the "indispensable element" of the crime, Dobar, supra. Assuming, arguendo, that the statute is constitutional, the appellant contends the making of the contract under which he is being prosecuted did not comply with applicable law, thereby rendering such contracts void and preventing any prosecution thereunder. In the alternative, appellant further contends that the substance of the testimony taken at the hearing of the issue clearly substantiates the position that the original Design Contracts were "formally advertised" and that the subsequent production agreements were modifications and/or amendments of the original contracts, thereby removing the contracts from the purview of 41 U.S.C. 51-54.

A. THE STATUTE IS VOID FOR VAGUENESS

It is axiomatic that criminal statutes must be strictly construed and require reasonably clear guidelines to prevent arbitrary and discriminatory enforcement. Smith v Goguen, 415 U.S. 566 (1974). This court, as recently as a year ago, held that well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. United States ex rel Newsome v Malcolm, 492 F. 2d 1166 (2nd Cir.1974); 41 U.S.C. 51 et seq.provide a civil remedy for the government, as well as criminal sanctions. Though the wording of 41 U.S.C. 51 et seq. might be explicitly sufficient to define civil liabilities, it lacks the certainty required for criminal sanctions. The standard of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement. A crime must be defined with appropriate definitions and there must be ascertainable standards of guilt. Winters v People of the State of New York, 333 U.S. 507 (1948); United States v Dennis, 183 F. 2d 201 (2nd Cir.1950) aff'd. 341 U.S. 494 rehearing denied 342 U.S. 842, 355 U.S. 936.

41 U.S.C. 52 defines "negotiated contract" as any contract which is not procured by "formal advertisement". No definition of the requirements for "formal advertisement" which has peculiar application to the law can be found. Thus,

the requirements that would make a contract "non-negotiated", thereby removing that contract from the purview of the Act is not determinable.

It is the government's position that the definition of the term "formal advertising" as found in 10 U.S.C. 2305 is controlling, but if a statutory or regulatory definition of the terms is to be adopted for purposes of the statute, is that the applicable definition? "Formal advertising" is a term utilized in government procurement and defined differently throughout the United States Code and Federal Regulations, cf 10 U.S.C. 2271; 10 U.S.C. 2305; 41 C.F.R. 1-2.101 et seq.; 1-2.501 et seq.; 3-2.2 et seq.; 4-2.2 et seq.;5-2.2 et seq.; 5A-2.2 et seq.; 5B-2.2 et seq.;8-2.102 et seq.; 9-2.102 et seq.; 12-2.201 et seq.; 12-2.25 et seq.; 18-2.101 et seq.; 18-2.25 et seq.; 18-2.5 et seq.; Armed Services Procurement Regulations, 2-101 (i-iv); 2-103 (i-iv); 2-104.

It is interesting to note that 10 U.S.C. 2305 itself is phrased in broad terms lacking specificty as opposed to the specificity of the other statutes and regulations cited supra. This is especially so with respect to 10 U.S.C. 2271 et seq. Various agencies of the government required to interpret and to adopt regulations pursuant to statutes have interpreted the meaning of the term "formal advertising" in several different manners. A defendant or prospective defendant in a

criminal prosecution has no basis to determine from the statute what conduct is prohibited by law.

Presented with a dispute under this Statute, the Ninth Circuit Court of Appeals in United States v Perry, supra (1023) noted that they were confronted with an extraordinarily ambiguous statute having an inconclusive legislative history and nearly a complete absence of relevant precedent. Obviously, 41 U.S.C. 51 et. seq. is not sufficiently explicit to inform those who are subject to it what conduct will render them liable to its penalties and is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Therefore, it is a violation of due process of law and a deprivation of the constitutional rights of the defendant. United States v Cardiff, 344 U.S. 174 (1952); Lanzetta v State of New Jersey, 306 U.S. 451 (1939); Connally v General Construction Company, 269 U.S. 385 (1926); Winters v People of the State of New York, supra.

B. THE CONTRACTS AT ISSUE ARE VOID

Assuming, arguendo, the applicable statute is found to be sufficiently clear and definite to remove it from the "void for vagueness" doctrine, it is appellant's position that the contracts at issue are void (or at the very least voidable) and, therefore, non-existent, preventing any crimi-

nal prosecution thereunder.

If a contract is procured through "negotiations" when the applicable statute requires "formal advertisement", the resulting contract is void. New York Mail and Transportation Co. v United States, 139 Ct. Cl. 751 (1957). All during the procurement process if each and every guideline is not specifically complied with the resulting contract is voidable. United States v Brookridge Farms, Inc., 111 F. 2d 461 (10th Cir. 1940). It is also well-established that one not a party to a contract awarded by the government can challenge the legality of the procurement if he is adversely affected by the award. 41 U.S.C. 51 et. seq.; Kentron Hawau, Ltd. v Warner, 480 F. 2d 1166 (D.C. 1973); Constructores Civiles de Centroamerica, S.A. (Concica) v Hannah, 458 F 2d 1183 (D.C. 1972). As this basic proposition holds true under civil law, so too, by necessity, its application becomes more fundamental when applied to a civil law with a criminal sanction.

It is the government's position that the proper statute governing the procurement of aircraft from the design stage to production is 10 U.S.C. 2301 et. seq. Appellant maintains that the governing statute for the procurement of aircraft beginning at the design stage is 10 U.S.C. 2271et. seq. and that procurement under any other law makes void the contracts entered into under those provisions. Mr. Erling Nelson testified that the Navy ceased the use of 10 U.S.C. 2271 et seq.

when the Armed Services Procurement Act was passed. He agreed that 10 U.S.C. 2271 et. seq. had not been repealed, but indicated that the statute was just ignored. Mr. Nelson further testified that the decision to ignore the law was based upon a chain of correspondence between Rep, Mendel Rivers, the Air Force's General Counsel and the Comptroller General. The result of these letters was a ruling by the Comptroller General "that the law [10 U.S.C. 2271] was there, but it did not have to be used, that the Armed Services Procurement Act was the better authority". (198-201) This ruling is kept in a restrictive file, never made public, nor are copies to be found in either the Navy Department or the executive branch. (201)

When two statutes are capable of co-existence, it is the duty of courts to regard each as effective, absent a clearly expressed congressional intention to the contrary. Morton v Mancari, 417 U.S. 535 (1974). And,where successive enactments are apparently inconsistent, a court must seek to resolve the ambiguity in a manner which gives effect to the latest legislative expression and still leaves an area of effective operation for the earlier expression. International Union of Electrical, Radio and Machine Workers, AFL-CIO v National Labor Relations Board, 289 F. 2d 757 (D.C. 1960). Such determinations can be made with respect to the two statutes in question. Though 10 U.S.C. 2301 et.seq. has been amended more recently in time, its scope and purpose is not as specific as

10 U.S.C. 2271 et. seq. (45). The former refers generally to the "purchase and contract to purchase ... of all property named [aircraft numbered 7 in a list of 10 items] .... for which payment is to be made from appropriated funds: [of] The ... Army ...Navy ...Air Force ... Coast Guard [and] ... National Aeronautics and Space Administration". 10 U.S.C. 2303 (47). The latter is confined to the procurement of new designs of aircraft, parts and accessories for the Army, Navy, Air Force and Marines with the express purpose of encouraging the development and improvement of aeronautical war material. At the design stage there can be no doubt but that 10 U.S.C. 2271 et. seq. is the controlling authority and, the deliberate act of the government in ignoring this law voids the contracts in question. Further these void contracts cannot form the basis for the criminal prosecution of appellant, one not a party to the contracts. The fact that the contracting parties have not disavowed their obligations and/or the contract having been fully performed, does not preclude appellant from raising the issue in a criminal prosecution. (45-50)

Even if this court rules that the government proceeded properly under 10 U.S.C. 2301 et. seq., the same conclusion must be reached under a separate theory. The burden in a criminal prosecution rests with the government to meet each and every individual element of the crime charged. Davis v

United States 160 U.S. 469, 487 (1875); Grunewald v United States, 353 U.S. 391 (1957); Christoffel v United States 338 U.S. 84, 89-90 (1949); Brihegar v United States 338 U.S. 160 (1949). One of essential elements is to show the statute was specifically followed. 10 U.S.C. 2304 requires all purchases and contracts to purchase property or services shall be made by "formal advertising" wherever feasible and practicable. Negotiation may be used when "formal advertising" is not feasible and practicable.

In such cases determination and findings must be made pursuant to 10 U.S.C. 2310. After the government rested its case, there arose a dispute as to the admissibility of the determinations and findings (exhibits 1-A through 10-A for identification) based upon their authenticity. In response to the court's inquiry "why do we need these documents, anyway?," Assistant U.S.Attorney DePetris responded "Actually I suppose at this point, at this stage of the record, we don't at this stage ... I can rest and produce this on rebuttal if anything happens with the defense case." (95-97) The determinations and findings were never introduced into evidence or subjected to cross-examination. Further questions as to the propriety of the making of the determination and findings arose from the testimony of Erling Nelson. Mr. Nelson testified that the Navy "could not commence the negotiation process with the contractor without the determination and findings. That's a

legal requirement". (208) He subsequently indicated the Navy was criticized by the General Accounting Office for not making determinations and findings prior to the commencement of the negotiations of the contracts in point (225-6). As the determination and findings were never before the court and as the making of the determinations and findings were in question, the court could not assume the validity of the contracts.

A further question arises concerning the compliance by the government with the requirements of the law (10 U.S.C.2301 et. seq.) Mr. Nelson testified that under the design competition for one of the aircraft (E-2), some fifteen companies responded to or were given notice of the Navy's specifications. Of these, four companies submitted proposals with designs. With respect to a second aircraft (A-6) eight of nineteen companies responded with technical data. In both cases Grumman was awarded the contract. (201-206) This testimony must be viewed in light of the responses to the subpoenas issued by appellant to seven major aircraft manufacturing corporations. (McDonnell-Douglas Corp., Fairchildre Republic, Martin Marietta Corp., Textron, Inc.,Lockheed Aircraft Corp., Boeing and North American Rockwell). In all cases the subpoeaned corporations indicated that their records showed no solicitations, bids or proposals for the aircraft in question. (10-27,37-9) Based upon the above, it cannot be held that the government met its

burden with respect to full and faithful compliance with the law they claim applicable.

C. THE CONTRACTS WERE PROCURED BY FORMAL ADVERTISING

Though throughout the testimony of Baker and Nelson the contracts in question were constantly categorized as "negotiated" or "competitively negotiated", the substance of the testimony clearly substantiates appellant's position that the contracts were "formally advertised".

Baker testified he had no personal knowledge of the award of the design contracts, but generally was familiar with the process of such an award. He outlined the procedure as follows:

1. A general industry solicitation followed by
2. an award to the contractor with the best design followed by
3. a sole source procurement contract for production from the contractor awarded the original design contract (177-182)

Baker further testified that the production contracts for the aircraft in question were 'negotiated', but indicated he personally could not recall or definitely did not have any negotiations with the Navy prior to the making of the contracts. (134-150)

Nelson's testimony was even more explicit concerning

the procedure preceding the award of the design contracts.

1. The Navy's needs were determined

2. The industry was notified (by publication or by mail)

3. Many bids were received which included designs, design costs and projected production costs

4. A technical decision was made for the selection of the best proposal overall

5. A determination was made that if production was required it would be a sole source contract from the design contractor (Grumman)

6. Price and specification re-negotiation would precede production (212-214)

Nelson testified that this process was "competitive negotiation" as opposed to "negotiated" or "formally advertised". He never explained the difference between the three, except indicating that all three required a competitive process.

As discussed supra, 41 U.S.C. 52 defines "negotiated contract" as one not procured by "formal advertising" without further definition of the terminology used. A review of the legislative history of the statute reported in 1960 U.S. Code and Cong. & Admin. News, 3292 et. seq. indicates that as used in the statute "formal advertising" means the normal competitive process to allow government procurement at the lowest possible price. A leading treatise on government contracts has summarized procurement by "formal advertisement" as follows:

> In most instances, Government procurement is effected by means of formal advertising, that is, the selection of the contractor by the competitive procedure that includes the issuance of an invitation for bids, the reception of sealed bids in response thereto, and the award of the contract to the lowest responsible bidder.

Wachtell, McBridge and Touhey, Government Contracts, §10 at 13 (1974).

The above enumeration of the steps required for "formal advertisement" corresponds point by point with the testimony of both Baker and Nelson indicating substantial compliance by the government with "formal advertising". Also obvious from the substance of the testimony is the fact that there was in actuality a single contract (a design contract) which was followed by a series of modifications and amendments. Baker testified that the production contracts were separate contracts, but on the face of the design contracts there were amendments and modifications and that on long lead funding the original contract was closed out giving rise to the superceding production agreement. Cf. exhibits 11, 12 and 13. Both men testified that the design bids included production estimates and costs and that their figures were considered along with the design proposals when the design contract was awarded. Both men also testified that there was a determination at the time of the

design award that a sole source production procurement would follow from the design contractor with subsequent readjustments in price and possibly specifications. (177-185, 201-223)

Upon reading all the testimony in relation to the applicable statutes and regulations, it becomes apparent that the contracts in question were made by "formal advertisement" with the provisions for price modification or revision at a subsequent time. Such a contract condition is perfectly acceptable under the Code of Federal Regulations, and does not thereby bring the contract within the statute. 41 C.F.R. 1-2.104; 41 C.F.R. 1-2.104-3. Once a contract is "formally advertised" and a bid selected, the fact that "negotiations" between the contractor and the government followed as to price or contract modification or amendments, the original nature of the procurement cannot be altered. Wachtell, supra, citing Leitman v United States, 104 Ct. Cl. 323,341 (1945); Paul, U.S. Government Contracts and Subcontracts, 161-162 (1964).

For all of the above reasons the government has failed to meet its burden beyond a reasonable doubt.

POINT II

APPELLANT WAS DENIED A TRIAL BY JURY

The right to a trial by jury is a fundamental right guaranteed by:

(A) The Constitution of the United States, Article III, Sec. 2, Par. 3:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ...;

(B) Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ...;

(C) and by statute, Rule 23 of the Federal Rules of Criminal Procedure:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the government.

In the instant case appellant not only did not affirmatively waive a jury trial, but specifically demanded such right. In denying appellant's motion the court held that:

> ... by pleading guilty [appellant] waived his constitutional right to a jury trial ... I will, however, ... hear this as in effect a motion to set aside the judgment of conviction based on newly-discovered evidence not available to you [Rule 33] ... I believe this procedural device is a more effective device and is consonant with the rules of practice and the jurisdiction of the Appellate Courts. (81-82)

In thus ruling the court below erred in two respects. Firstly, logic dictates that a defendant who chooses to plead

guilty rather than go to trial waives any motion pursuant to Rule 33 for a "new trial" as there was no trial in the first instance. United States v Forrest, 482 F. 2d 777 (D.C. Cir. 1973). Secondly, a stipulation was entered into between the appellant and the government prior to the entry of a plea wherein appellant reserved the right:

> ... to raise at a hearing before the District Court and on appeal the issue as to whether the requisite prime contracts between Grumman Aerospace Corporation and the Department of the Navy were 'negotiated' within the meaning of Title 41 United States Code, Sections 51 through 54. (26)

This stipulation was consented to by the court. It is appellant's position that this stipulation and, specifically, the right to a hearing, preserved his constitutional rights.

The above-mentioned stipulation was designed from guidelines set by this court in recent decisions. United States v Mann, 451 F. 2d 346 (2nd Cir. 1971); United States v Doyle, 348 F. 2d 715 (2nd Cir. 1965). Both these cases stand for the proposition that, an issue can be preserved for appeal after a guilty plea if properly preserved. The stipulation in point goes beyond the scope of these cases by additionally preserving a right to a hearing. This hearing was to have been, in effect, a trial on a specific factual question and one at the very moot of the underlying indictments. The determination of this factual question was the key to whether or not the in-

dictments were hopelessly and irrevocably defective. At the conclusion of this "trial" one of two alternative situations could have resulted:

(1) A factual determination that the government complied with all necessary and mandatory provisions of the law, thereby mandating the conclusion that the contracts were "negotiated" and, thus enhancing the record for appellate review;

(2) A factual determination that the contracts were not "negotiated" as provided for in the law, thereby mandating the dismissal of the indictments and the vacating of appellant's plea of guilty thereunder.

As the trial issue of fact was the cornerstone issue of the government's case, the denial of an impanelled jury violated appellant's constitutionally protected rights.

POINT III

THE COURT ERRED BY QUASHING APPELLANT'S SUBPOENAS

Upon the government's motion to quash a subpoena duces tecum issued by appellant a hearing was held. The subpoena called for the protection of all pre-contract advertisements, invitations, correspondence, proposals, memoranda, submissions, last and final offers between the United States Navy and eight (8) separate aircraft companies with respect to the design, production and development of A2F1 (A6), E2 and EA6 or their precursors, including all books, records, memoranda, etc. relating thereto. The government argued that this subpoena should be quashed as it was too burdensome and irrelevant to the issue before the court. The court agreed with the government's position, finding the appellant's arguments "tenuous". (64-70)

The motion to quash the subpoena could have been granted upon one of two grounds, either the subpoena was unreasonable or oppressive, or the subpoena lacked relevancy and/or specificity. Rule 17 (c) Federal Rules of Criminal Procedure; United States v Gurule, 437 F. 2nd 939 (10th Cir. 1970).

A particularly heavy burden rests upon the party seeking a subpoena to be quashed when the basis for such a motion is the oppressive or unreasonable nature of the subpoena.

Westinghouse Electric Corp. v City of Burlington, Vermont, 351 F. 2d 761 (2nd Cir.1965); on remand 246 F. Supp. 839; Horizons Titarrium Corp. v Norton Co., 290 F. 2d 421 (1st Cir. 1961); Goodman v United States, 369 F. 2d 166 (9th Cir.1966). With respect to this argument the government did not meet its burden. Assistant United States Attorney DePetris argued that he was advised that it would be very burdensome for the government to produce the requested documents. He then indicated he was not sure if in fact these documents were in existence. In a subsequent argument Mr. DePetris modified his position by indicating the subpoenas could be burdensome. (67-70) Therefore, it could not have been held that the government's heavy burden was supported by the frailty of its argument.

A second argument by the government was that the subpoenaed documents lacked relevancy. In argument before the court Mr. DePtris outlined a three step approach he felt appellant must follow to substantiate his claim. DePetris conceded that with respect to the third step "there might possibly be some relevance to the subpoena". (67) In response to this argument appellant reminded the court that the issue in controversy was the nature of the contracts. That the subpoenaed documents and memoranda were required to substantiate appellant's sole position that the contracts were made by "formal advertisement" and not "negotiated". (72)

As there existed no controversy that the nature of the contracts in question formed the cortex of the case, it could not be said that the documents sought were irrelevant to the issue before the court. Implicit in appellant's argument was that the quashing of his subpoenas would unduly prejudice the preparation of his case causing a substantial hardship. United States v American Optical, 39 F.R.D. 580 (D.C. Cal.1966); Boeing Airplane Co. v Coggeshall, 280 F. 2d 654 (D.C. 1960).

Based upon the foregoing it is obvious that the court below erred in granting the government's motion to quash. In so doing the appellant was precluded from substantiating his contentions as favorable documentary evidence in the sole possession of the prosecution was excluded.

CONCLUSION

The judgment of conviction should be reversed and the motion to dismiss the Indictment granted.

Respectfully submitted,

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Attorneys for Defendant-Appellant

AFFIDAVIT OF SERVICE BY MAIL

State of New York
ss
County of Nassau

Joseph L. Clementa, being duly sworn, deposes and says:
That he is ~~the president~~ of the Davenport Press, Inc.,
printers of the attached Brief in the matter of

U.S.A. against Joseph Hanlan

That on the 28 day of May, 1975 he served 3 copies of said Brief on

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by depositing same, securely enclosed in a post paid wrapper in a Post Office regularly maintained by the United States government at Mineola, New York, County of Nassau, directed to said attorney(s) at the address listed above, that being the address within the state designated for that purpose upon the preceding papers in this action, or the place where ~~he~~ then kept an office between which places there was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Joseph L. Clementa

Sworn to before me this
day of

KEVIN G. SLEICHER
NOTARY PUBLIC, State of New York
No. 30-4502141
Qualified in Nassau County
Commission Expires March 30, 1977